No. 10118

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCHAEFER-HITCHCOCK COMPANY, RESPONDENT

UPON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Respondent contends (Br., pp. 20–22) that the Board's finding of violation of Section 8 (3) of the Act with respect to the discharge of Damschen is improper "because of the absence of proof that the discharge * * * had the effect, of encouraging or discouraging membership" in the Union.[1] The Board expressly found (R. 41), without independent testimony as to the discouraging effect of the dismissal, that Damschen's discharge because of his union membership and activities discouraged membership in the Union. Respondent's complaint apparently is that the Board *inferred* that respondent's antiunion discrimination against

[1] Respondent also challenges the substantiality of the evidence in support of the Board's finding that the basis of respondent's discharge of Damschen was his union membership and activities. We have fully answered this contention in our main brief at pp. 13–17, and therefore do not reargue it here.

Damschen discouraged union membership. Its argument presumably is that, in order to establish a violation of Section 8 (3) of the Act, the Board was required to establish such discouraging effect by independent testimony.

It is the Board's view that the discharge of an employee because of union membership *ipso facto* violates the Act without independent testimony as to its effect, because such discrimination *inevitably and as a matter of course* "discourage[s] membership in any labor organization," in flat violation of the prohibition of Section 8 (3). Certainly it discourages the union membership of the discharged employee to whom the discharge has brought home the fact that he can adhere to a union only at the cost of his means of livelihood. Necessarily it also discourages union membership on the part of the other employees to whom the discriminatory discharge is a warning that if they remain union members their turn may come next.

The propriety of this view is established beyond question by the decisions of the Supreme Court construing Section 8 (3). That Court has in a great many cases and without exception upheld Board findings of violation of Section 8 (3) simply upon supported findings of discrimination such as are present in the instant case and despite a complete absence of testimony that the discrimination actually affected union membership or activities. E. g., *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 129; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 255; *National Labor Relations Board* v. *Link-*

Belt Co., 311 U. S. 584, 589, 598, 600, 603; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 181, 183, 185, 187. All of the Circuit Courts of Appeals, including this Court, have followed this correct practice in hundreds of cases. While the practice is so commonplace that citation of cases seems unnecessary, we may refer the Court to its decisions in *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 658–659; *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493–494, cert. denied, 306 U. S. 643; *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 82, cert. denied 310 U. S. 632; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 792, cert. denied 312 U. S. 678. The only Circuit Court of Appeals in which a contrary view has ever been expressed (*Stonewall Cotton Mills, Inc.*, v. *National Labor Relations Board*, 10 L. R. R. 514 (C. C. A. 5)), upon which respondent relies (Br., pp. 20–21), modified its position on the Board's petition for rehearing (10 L. R. R. 663, decided July 6, 1942).

National Labor Relations Board v. *Air Associates, Inc.*, 121 F. (2d) 586 (C. C. A. 2), which respondent also cites (Br., p. 21), is not to the contrary. That case involved five discharges. Of these, three (Seifert, Werner, and Thompson) were of the conventional type, involving dismissals because of the union activities of the employees in question, precisely like Damschen's dismissal in the instant case. Upon findings (20 N. L. R. B. 356, 376–388) that these three employees

were discharged because of their union activities, the Board concluded, exactly as here and without any direct testimony as to the actual effect of the discharges, that the employer had discouraged union membership by discrimination, in violation of Section 8 (3) of the Act (20 N. L. R. B., at 380, 384, 388, 390). The Second Circuit enforced the Board's findings and order in this regard without any discussion of or reference to the necessity of direct testimony of actual discouraging effect (121 F. (2d), at 591–592).

Two of the discharges in the *Air Associates* case (Rodolitz and Geoghegan) presented a unique fact situation in that, as the Board found (20 N. L. R. B., at 371–375), these men were discharged, not because they were members of or active in the union—indeed the Board did not find that their union membership was even known to the employer (*ibid.,* p. 375)—but because the employer desired to create resentment against the union by unnecessarily discharging ordinary employees, thus counteracting the effect of the union's success in securing the reinstatement of four union shop committeemen who had been previously discharged by him. The Board found that these discharges, also, constituted discrimination discouraging union membership, in violation of Section 8 (3) (20 N. L. R. B., 375, 390). In denying enforcement of the Board's order in this regard the Second Circuit declared that the employer's conduct did not violate Section 8 (3) because the Court could "discover no satisfactory explanation by the Board which would permit either a finding that the unlawful purpose had

the effect required by the Act [that is, discouraging union membership], *or findings from which such an effect might reasonably be inferred"* [italics supplied]. This statement was explained in a very recent decision in which the Second Circuit again sustained Board findings that discharges for union membership and activities violated Section 8 (3) without any testimony that such discrimination actually affected union membership or activities (*National Labor Relations Board* v. *Cities Service Oil Co.,* 10 L. R. R. 656, decided July 2, 1942). In this case the Court (in an opinion written by the same judge who wrote the *Air Associates* opinion) explained the unusual "setting" in the *Air Associates* case which had prompted this statement; it pointed out that in that case, "left unaided by the Board's expert knowledge of the subject," it could find no "rational basis" for concluding that an employer's conduct in telling nonunion men that they must be dismissed to make room for union men would "necessarily" tend to discourage union membership. And the Court explicitly announced that the statement in the *Air Associates* case "should be read in its factual context and, accordingly, should be very narrowly limited."

Hence the *Air Associates* case is not authority for respondent, but rather for the Board (see *supra,* p. 2), in a case such as the present, involving a conventional discharge because of union membership and activities.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that the order should be enforced.

Respectfully submitted.

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